ATTORNEY FOR APPELLANT:

NEIL L. WEISMAN
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

STEPHEN R. CARTER
Attorney General of Indiana
Indianapolis, Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

BRIAN TAYLOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0801-CR-6
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable R.W. Chamblee, Jr., Judge
Cause No. 71D08-0603-FA-00010

MAY 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Brian Taylor (Taylor) appeals his convictions of attempted murder, a Class A felony, Ind. Code §§ 35-41-5-1, 35-42-1-1; robbery, a Class B felony, Ind. Code § 35-42-5-1; and battery, a Class C felony, Ind. Code § 35-42-2-1.

We affirm.

ISSUES

Taylor presents two issues for our review which we restate as:

I. Whether the State presented sufficient evidence to sustain Taylor's convictions.

II. Whether the State injected an evidentiary harpoon into the trial.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the verdict are as follows. Teeth R Us is a custom tooth shop in South Bend owned by Jessie Taylor (Jessie). Jessie is not related to the defendant. On February 24, 2006, Jessie, Clarence Bramley (Bramley), Joe Williams (Williams), Taylor, and a male known as "Little E" were present at the tooth shop. The men were playing dice at a table in the shop. Eventually, Taylor and Little E abruptly left the shop. Approximately, thirty minutes later, Taylor and Little E returned. Taylor demanded Williams' money, and when Williams refused to give Taylor his money, Taylor shot him. A struggle ensued in which Williams was shot several times by Taylor, even after Williams turned over his money.

Based upon this incident, Taylor was charged with attempted murder, a Class A felony; robbery, a Class B felony; and battery, a Class C felony. Following a jury trial, Taylor was convicted of all counts and sentenced to an aggregate sentence of thirty years. It is from these convictions that Taylor now appeals.

DISCUSSION AND DECISION

I. SUFFICIENCY OF THE EVIDENCE

Taylor contends the State failed to present evidence sufficient to support his convictions. Specifically, Taylor argues that the State's identification evidence cannot support his convictions because the testimony of the State's witnesses is incredibly dubious and because he presented strong alibi evidence.

Our standard of review with regard to sufficiency claims is well settled. We neither weigh the evidence nor judge the credibility of the witnesses, and we consider only the evidence favorable to the verdict and all reasonable inferences which can be drawn therefrom. *Newman v. State*, 677 N.E.2d 590, 593 (Ind. Ct. App. 1997). If there is substantial evidence of probative value from which a trier of fact could find guilt beyond a reasonable doubt, we will affirm the conviction. *Id*. Moreover, we are mindful that the trier of fact is entitled to determine which version of the incident to credit. *Barton v. State*, 490 N.E.2d 317, 318 (Ind. 1986), *reh'g denied*.

Taylor claims that the testimony of both Bramley and Williams is incredibly dubious. We will address each in turn. At the beginning of his testimony on direct examination, Bramley testified that he had pending federal gun charges for which he already had a plea agreement but had not yet been sentenced. Although he had no

promise from the State in exchange for his testimony in the current case, he hoped the State would put in a good word for him with the federal prosecutor. In addition, defense counsel explored this issue on cross-examination and received the same information. Bramley further testified that he had not known Taylor very long but that he had gambled with him a few times at the tooth shop. He indicated that the group was playing dice and that Taylor and his friend left. They returned later, and Taylor told Williams to hand over his money. Taylor shot Williams, and the two wrestled in another room. Taylor came out of the room to obtain another gun, and Bramley escaped from the shop. Bramley identified Taylor at trial as the person he was playing dice with and the person who shot Williams.

The incredible dubiosity doctrine applies "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt." *Thompson v. State*, 765 N.E.2d 1273, 1274 (Ind. 2002). This Court has observed that application of this doctrine is rare, but, when used, the applicable standard is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it. *Krumm v. State*, 793 N.E.2d 1170, 1177 (Ind. Ct. App. 2003). Taylor has failed to point to any part of Bramley's testimony that was inherently contradictory or coerced. Moreover, our review of the record reveals that Bramley testified unequivocally that Taylor is the person who shot Williams.

Williams testified that he was playing dice with Jessie, Bramley, Taylor, and Little E at Jessie's shop when Taylor and Little E left abruptly. Approximately thirty minutes

later, Taylor and Little E returned to the tooth shop. Upon entering the shop, Taylor pointed a gun at Williams and demanded Williams' money. Williams refused to turn over his money and attempted to leave the shop, but Taylor shot him in the back and the buttocks. Williams entered another room in the shop for safety, and Taylor followed him. The two men wrestled, and the gun fell to the floor. Taylor retrieved the gun and began shooting again at Williams. After shooting Williams in the ankle, Taylor ran out of bullets, so he obtained another gun from Little E. Taylor held the second gun to Williams, and Williams gave Taylor his money. After handing over his money, Williams was shot again by Taylor in the arm as he blocked his face. Taylor then left the tooth shop, and Williams went into the bathroom to wait until it was safe. When Williams emerged from the bathroom, he exited the tooth shop and found Jessie in the parking lot in a vehicle. Jessie drove Williams to the hospital where he was treated and released. Williams further testified that he had known Taylor for one to two years prior to this incident, and Williams unequivocally identified him at trial as the man who shot and robbed him.

On direct examination, Williams also testified that he first told the police that he had walked to the hospital. He testified that he told them that because Jessie did not want his business implicated in the incident. When the officers confronted Williams with the fact that they had video of a car dropping him off at the hospital, he told the version of events to which he testified at trial. This prior statement was also explored by defense counsel on cross-examination.

Taylor points to Williams' pre-trial, out-of-court statement in support of his incredible dubiosity argument. However, the rule of incredible dubiosity concerns courtroom testimony, not statements made outside of trial or the courtroom. *Reyburn v. State*, 737 N.E.2d 1169, 1171 (Ind. Ct. App. 2000); *see also Holeton v. State*, 853 N.E.2d 539, 541-42 (Ind. Ct. App. 2006) (holding that discrepancies between statements made to police and trial testimony goes only to weight of testimony and witness credibility and does not render testimony inherently contradictory). Therefore, these prior statements do not make Williams' testimony incredibly dubious. Moreover, Taylor points to no part of Williams' testimony that was inherently contradictory or coerced, and our review of the record discloses that Williams testified unequivocally that Taylor is the person who shot and robbed him.

With regard to the testimony of both Bramley and Williams, Taylor is merely inviting us to reweigh the evidence and judge witness credibility. We must decline this invitation.

Another component to Taylor's incredible dubiosity argument is his assertion that Bramley and Williams could not differentiate between Taylor and his twin brother. Taylor suggests that because no fingerprints were obtained and because he consistently denied his involvement in the incident, the testimony of Bramley and Williams was inherently contradictory and not sufficient to identify him as the perpetrator of these crimes.

In making this argument, Taylor completely overlooks certain testimony of both men. Bramley testified at trial that the man sitting in the courtroom was the man he was

gambling with on the night of this incident. Additionally, during trial, Williams was specifically asked if he could tell the two brothers apart. Williams answered affirmatively and stated, "One of them had dreadlocks, and the other one had braids, you know, at the time." Tr. at 67. In response to a juror question, Williams testified that he could tell the brothers apart if they were together, had the same haircut, and neither of them spoke. Tr. at 113. In addition, Williams stated that Brandon had a "little limp." Tr. at 67.

There is nothing in either man's testimony that is inherently contradictory or coerced. Moreover, it is the function of the trier of fact to determine the weight of the evidence and the credibility of the witnesses. *K.D. v. State*, 754 N.E.2d 36, 39 (Ind. Ct. App. 2001). In the present case, the jury heard the testimony, was able to view the witnesses as they were presenting their testimony, and found Taylor guilty on all counts. We respect the jury's exclusive province to weigh the conflicting evidence, and therefore we will not disturb their determination.

Finally, Taylor asserts that the strength of his alibi evidence overcomes the weakness of the identification evidence presented by the State. However, having determined that the identification evidence is sufficient, we now also determine that Taylor's alibi defense was deficient. In support of his alibi, Taylor presented the testimony of his girlfriend, Javonna Harris, and her hairdresser, Ronnell Lacy. Both Harris and Lacy testified at trial that on the night in question Taylor was with Harris at Lacy's shop where both Harris and Taylor had their hair done. Officer Ruszkowski, a South Bend police officer, testified on behalf of the State regarding Taylor's claimed

alibi. He stated that Taylor told him he had been with his girlfriend all day and all evening on February 24, 2006. Upon hearing this, Officer Ruszkowski then spoke with Harris in a separate room where she told him that Taylor was not with her at her hairdresser's. While Officer Ruszkowski was talking to Harris, they used Harris' cell phone to call Lacy, who confirmed that he had not seen Taylor that day. Another South Bend police officer, Officer Taylor, testified to essentially the same facts as Officer Ruszkowski.

A jury may choose to disbelieve alibi witnesses if the State's evidence renders such disbelief reasonable. *Carr v. State*, 728 N.E.2d 125, 130 (Ind. 2000). Here, the State's evidence certainly rendered the jury reasonable in disbelieving Taylor's alibi witnesses. We do not disturb the jury's determination.

II. EVIDENTIARY HARPOON

For his second assertion of error, Taylor claims that the State injected an evidentiary harpoon into the case during its case-in-chief. An evidentiary harpoon is the placing of inadmissible evidence before the jury with the deliberate purpose of prejudicing the jurors against the defendant. *Roberts v. State*, 712 N.E.2d 23, 34 (Ind. Ct. App. 1999), *trans. denied*. In order to obtain a reversal based upon the introduction of such evidence, the defendant must show that (1) the prosecution acted deliberately to prejudice the jury, and (2) the evidence was inadmissible. *Id*. In order to obtain a reversal, the defendant need not show that an evidentiary harpoon injured him to the extent that he would not have been found guilty but for the harpooning; rather, the defendant need only show that

he was placed in a position of grave peril to which he should not have been subjected. *Jewell v. State*, 672 N.E.2d 417, 424 (Ind. Ct. App. 1996), *trans. denied*.

Taylor argues that the testimony of a deputy prosecutor at his trial created an improper inference that the Taylor twins could be distinguished, thereby bolstering the State's case of identification evidence. At trial, the State called as a witness a deputy prosecutor who had served a subpoena on Taylor's brother, Brandon Taylor, the day before her testimony. She was asked, "How did you know who Brandon Taylor was?" and she responded, "I – as I mentioned earlier, I had been down in the courtroom earlier in the morning and I had had a chance to observe, obviously, the trial and different people in the courtroom. And I noticed who Brian Taylor was, and I also know that he has a twin brother, and I noticed another individual sitting in the back of the courtroom that looked similar but I noticed some differences in characteristics – " Tr. at 254. Defense counsel objected, and the trial court sustained the objection and admonished the jury to disregard the witness' comments regarding the differences in characteristics of the twins.

Taylor has neither made a showing that the prosecution acted deliberately to prejudice the jury nor made a showing that the evidence was inadmissible. He also failed to demonstrate in any way that he was placed in a position of grave peril to which he should not have been subjected. We further note that defense counsel objected to the testimony prior to the witness revealing any of the characteristics to which she had alluded, and the trial court promptly admonished the jury. A timely and accurate admonishment is presumed to cure any error in the admission of evidence. *Kirby v. State*, 774 N.E.2d 523, 535 (Ind. Ct. App. 2002), *reh'g denied*, *trans. denied* (determining that

trial court cured any potential prejudice of alleged evidentiary harpoon with prompt admonishment).

CONCLUSION

Based upon the foregoing authorities and analysis, we conclude that the State presented sufficient identification evidence to support Taylor's convictions and that Taylor failed to make a showing of an evidentiary harpoon.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.